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MARCO ANTONIO TOPETE
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11 **YOLO COUNTY SUPERIOR COURT**
12 **STATE OF CALIFORNIA**

13 **PEOPLE OF THE STATE OF**
14 **CALIFORNIA,**

15 Plaintiff,

16 vs.

17 **MARCO ANTONIO TOPETE,**

18 Defendant(s).
19
20

FILED
YOLO SUPERIOR COURT

JUL 10 2009

By

C. Garrett
Deputy

Case no. CR08-3355

**NOTICE OF MOTION AND MOTION
FOR CONTINUANCE OF TRIAL;
DECLARATION OF HAYES H.
GABLE, III; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: August 7, 2009
Time: 9:00 a.m.
Department: 2

21 TO: THE DISTRICT ATTORNEY OF YOLO COUNTY:


22 PLEASE TAKE NOTICE that the defendant, MARCO ANTONIO TOPETE, by and through
23 his attorneys of record, will move the Court at the above time and place to continue the trial now set
24 for December 3, 2009.

25 This motion is made pursuant to the provisions of Penal Code section 1050 and is based upon
26 the attached declaration of counsel, the declaration of Mary Elizabeth Greenberg, filed conditionally
27 under seal pursuant to California Rules of Court, rule 2.551, subdivision (d), the memorandum of
28 points and authorities submitted herewith, and on such other oral and/or documentary evidence that

1 may be presented at the hearing.

2 Dated: July 9, 2009

Respectfully submitted,

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6 HAYES H. GABLE, III
Attorney for Defendant
MARCO ANTONIO TOPETE

7 **DECLARATION OF HAYES H. GABLE, III**

8 I, HAYES H. GABLE, III, declare:

9 1. I am one of the attorney appointed to represent the defendant, MARCO ANTONIO
10 TOPETE, in the above-captioned action.

11 2. The defendant is charged by indictment with the capital murder of Yolo County Deputy
12 Sheriff Antonio Diaz on June 15, 2008.

13 3. On November 21, 2008, this court, set a trial date of December 3, 2009. At the time,
14 defense counsel informed the Court that the defense could not be ready to try the case until at least
15 May of 2010. The court, in response, said, "I don't think this case will take eighteen months to
16 prepare."

17 4. Since that time, defense counsel has diligently prepared this case and continues to do so.
18 However, based upon the facts as set forth herein, and in the declaration of Mary Elizabeth
19 Greenberg, filed conditionally under seal, the defense will not be ready to proceed to trial as
20 presently scheduled.

21 5. As reflected in the authorities filed herewith, counsel for a defendant in a capital case have
22 a duty to their client to provide legal representation that is constitutionally adequate.
23 Constitutionally adequate representation requires counsel to make strategic and tactical decisions
24 based upon a thorough investigation of guilt phase issues and any mitigating factors which may be
25 relevant to a penalty phase of the trial. Failure to adequately investigate the case is not only shoddy
26 legal work, it risks reversal of any conviction and/or sentence imposed.

27 6. Counsel have identified the following areas that require additional investigation that must
28 be accomplished prior to trial:

1 (a) Discovery - To date we have received approximately 2411 pages of discovery. In
2 addition, approximately 65 CD's containing a variety of subject matter, including interviews of
3 witnesses, both audio and video, photographs, and crime scene video, have been provided through
4 informal discovery. Many of the recording will require transcription, in order to be reviewed by the
5 client and others consulting with counsel.

6 The prosecution, on or about May 7, 2009, served on the defense a list of factors in
7 aggravation, as required by Penal Code section 190.3. This statement include three felony
8 convictions and some 16 separate other crimes/conduct allegations, many of which involve multiple
9 alleged violations.

10 The defense has tendered informal requests for discovery, listing some 50 items, on March
11 16, 2009. To date, the defense has not received a response from the prosecution as to those requests.
12 Also, as to the aggravating crimes evidence set forth in the prosecution's 190.3 statement, the
13 prosecution has not provide discovery on approximately 10 of them.

14 It appears that the defense will be required to file formal motions to obtain this discovery.
15 The defense has not file such a motion to date based upon the assurances of counsel that such a
16 motion would not be necessary.

17 (b) Investigation - Investigation of guilt issues is continuing, but is hobbled by the
18 failure of the prosecution to provide requested discovery. The status of the penalty phase
19 investigation is detailed in Ms. Greenberg's sealed declaration. Based upon that declaration, it is
20 evident that the trial of this case cannot proceed as presently scheduled.

21 (c) Expert witness - The defense has, in addition to the investigators, retained expert
22 witnesses in a number of fields, including psychologists, a psychiatrist, a prison expert, a gang expert
23 (pending), a social historian, a criminalist, a venue expert, and a jury consultant. These experts have
24 been appointed as the need becomes evident, based upon ongoing investigation. Some of them are
25 just starting their work. Others are awaiting the production of certain evidence/testing to start their
26 work.

27 (d) Jail Conditions - The conditions at the Sacramento County Jail, where the
28 defendant is being held, are delaying the work of the defense team. The defendant is housed on 8

1 West. Currently, there is only one visitor's booth open on that floor to service the needs of 30 to 40
2 inmates and their attorneys. The Federal Defender's office is attempting to get the jail to resolve this
3 issue, but as of now, it severely impacts the ability of the attorneys, investigators and experts in this
4 case to have access to Mr. Topete.

5 7. The first death penalty case in which declarant participated was in 1985. Since that time
6 declarant has been counsel of record in at least 12 other capital cases. As the court is aware, because
7 defense funding in these cases is provided under a statutory scheme that requires court approval, the
8 process of investigation and preparation is cumbersome. In this case, and based upon almost 25
9 years of experience in cases of this type, it is my considered opinion that it will require at least 18
10 months from now for counsel to accomplish the tasks outlined above.

11 The question that this court must address is not whether the District Attorney's constitutional
12 right to a speedy trial will be somehow jeopardized by delaying trial. Rather, the question is when
13 the defense will be prepared to proceed to trial based upon a constitutionally adequate investigation
14 by counsel of all factual and legal issues relevant to both the guilt and penalty phases of the trial.

15 Based upon the foregoing, it is my considered opinion, and that of co-counsel, Thomas A.
16 Purtell, that the earliest reasonable date for this case to proceed to trial would be approximately
17 January of 2011.

18 Executed at Sacramento, California, on July 9, 2009.

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21 HAYES H. GABLE, III

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 California Penal Code section 1050 sets forth procedures for continuances of trial in criminal
24 cases. Subdivision (a) establishes the People's right to a speedy trial; the defendant has a
25 constitutional right to speedy trial under both the state and federal constitutions. However,
26 subdivision (a) of section 1050 continues to recognize that death penalty prosecutions are different,
27 and they are to be tried only when "both the prosecution and the defense have informed the court that
28 they are prepared to proceed to trial . . . " Penal Code 11050(a).

1 When a motion for continuance is filed, the court must make factual findings to ensure that
2 the length of any continuance granted is for that period of time shown to be necessary by the
3 evidence presented in support of the motion to continue the trial. (Penal Code §1050, subd. (i).)
4 As demonstrated by the declarations of counsel and of Mary Elizabeth Greenberg (under seal)
5 submitted herewith, the defense in this matter will not be ready for trial on the date presently set,
6 and will not be ready for some period of time thereafter. In that regard, provided herewith are
7 summaries of two significant cases from the United States Supreme Court which illustrate the
8 importance of adequate investigation and preparation by defense counsel in capital cases. The first is
9 *Wiggins v. Smith*, (2003) 539 U.S. 510, and the second is *Rompilla v. Beard*, (2005) 545 U.S. 374. .
10 The attached syllabus summaries demonstrate that in each case the Supreme Court, in part relying
11 upon the standards set forth by the American Bar Association in its publication entitled "Guidelines
12 for the Appointment and Performance of Defense Counsel in Death Penalty Cases" reversed death
13 penalty judgments based upon inadequate performance by trial counsel. In each case that inadequate
14 performance was determined to be insufficient investigation of evidence relating to the penalty
15 phase of the trials of the defendants.


16 These cases from the United States Supreme Court establish the standard of performance by
17 defense counsel in capital cases. That standard is set forth in the excerpts from the American Bar
18 Association's publication which are also attached hereto, Chapter 1.1, which outlines the objective
19 and scope of the Guidelines, and Chapter 10. 7 dealing with investigation, both as to penalty and
20 guilt phases of a capital case. Unlike the prosecution, which has no one monitoring its allocation of
21 resources in the investigation and preparation of the prosecution case, the defense in a capital case
22 has limited resources (subject to court scrutiny and approval) and must work in the arena of what
23 some have called the "Politics of Death." An example of this is the ignorance and bias the media
24 displays when it does not report on reasons for continuing trials: the law establishing duties of
25 defense counsel is not deemed newsworthy, but criticism of the delay of what is perceived to be
26 "justice" is sensational and politically safe.

27 The prosecution may be ready for trial as presently scheduled, but the defense is not. Until
28 both the prosecution and the defense announce ready for trial, the statutory right of the people must

1 give way. As demonstrated in the present motion to continue the trial date, good cause exists to
2 continue the trial in this case. If further good cause must be determined by the court, an *ex parte*, *in*
3 *camera* hearing is requested in order to allow counsel to divulge more details without prejudice to
4 Mr. Topete's defense.

5 Dated: July 9, 2009

Respectfully submitted,

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9 HAYES H. GABLE, III
10 Attorney for Defendant
11 MARCO ANTONIO TOPETE
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 430 3rd Street, Woodland, California 95695.

On the date below, I served the following document(s):

**NOTICE OF MOTION AND MOTION FOR CONTINUANCE OF TRIAL;
DECLARATION OF HAYES H. GABLE, III; MEMORANDUM OF POINTS
AND AUTHORITIES**

() BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

(X) BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

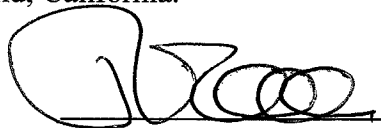
Yolo County District Attorney

() BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

() BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 10, 2009, at Woodland, California.



THOMAS A. PURTELL